

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 324 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? No
3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

ISMAIL UMARJI HAJI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR EE SAIYED for appellant no.1
Mr.D.F.Amin,Advocate for appellant no.2
Mr.Y.F.Mehta, APP for the respondent

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

Date of decision: 28/11/96

ORAL JUDGEMENT (N.J.Pandya,J.)

There were six accused facing charges under
Narcotic Drugs and Psychotropic Substances Act, 1985

(hereinafter referred to as NDPS Act). Of whom, four accused came to be acquitted and two came to be convicted. It is these convicted accused nos.3 & 4 of the trial Court, who have filed the present appeal. The proceedings before the trial Court were numbered as Sessions Case no.122 of 1991.

2. The Police Inspector of City Police Station of Bharuch had received information on or about 12th April 1991 that there is one person known as Safik Mohamad Vali Qureshi, who is a dealer in Narcotic. He, therefore, sent bogus customer and got purchased 3 tablets. As per his instructions, the bogus customer had also negotiated purchase of larger quantity, which was agreed to be delivered on 13-4-1991 for payment of Rs.1,00,000/-. The time and place for delivery was also agreed to. At about 5.45 p.m. near Nandwar crossing on Dahej bypass road, this transaction was to take place. On 13-4-1991 therefore, panchas were called and as it happens in a trap case, under Prevention of Corruption Act, first part of panchnama was drawn where all these facts were recorded including the said agreement to supply 50000 tablets of Mandrake for payment of Rs.1,00,000/-. After this was done, in two private maruti van, police party, Officers, customers, panchas etc. went to the site. They have taken precaution of putting the customer in a rickshaw. At the agreed spot the rickshaw with the bogus customer halted and the maruti van had stopped at a distance of about 200" from the spot and the occupants of the Vans dispersed themselves in a manner as to keep a watch at the place of the transaction that might occur. One rickshaw came from opposite direction i.e. western side and the customer ascended it and after that the occupant of the rickshaw which came on the scene subsequently wanted to see the currency notes, which were shown to him. The currency notes were carried in a brief case. There were 8 bundles of the denomination of Rs.100/-, and 4 bundles of the denomination of Rs.50/-. These 12 bundles were shown to him and after satisfying himself as to the amount, the said occupant of the second rickshaw took the brief case and gave a signal.

3. In response to the signal, another rickshaw came from western direction, halted there and it was in this rickshaw that Mandrake Tablets were brought which were to be delivered to the bogus customer pursuant to the agreement. In fact, this was about to be delivered, when the trap sprung and successful raid was carried out. Four persons were caught and alongwith Mandrake Tablets and the two rickshaws, they were brought to the Bharuch Police Station where the remaining part of panchnama was

drawn and the articles were seized. Thereafter, further investigation was carried out. At the end of the same, six persons came to be charge-sheeted and under the aforesaid Sessions Case, as per charge-sheet Exh.39, the learned Sessions Judge, after recording their plea decided to proceed further.

4. The result of the trial, as stated above, was that 4 persons came to be acquitted and 2 came to be convicted. The convicted persons happened to be in the rickshaw containing 50,000 tablets. Initially, on their behalf L.A. Mr.Saiyad for appellant no.1 and L.A. Mr.Amin for appellant no.2 very strongly urged that the mandatory requirement of Sec.50 has not been complied with. However, as the raid carried out was by a Police Inspector, who is a gazetted Officer, this Section is hardly attracted. We were requested not to give any decision on this point for the present and this point is not pressed for and therefore, it is left at that.

5. There was a reference to Sec.42 also in the course of the argument that the information received was not taken down in writing. There was some uncertainty as to the date on which the information was received.

6. If we take the prosecution case to be starting from the date on which information was received, pursuant to which initial purchase was made, then the date will be 10th April 1991. If the case of the prosecution is to be taken as the one from the date on which agreement to buy a larger quantity was arrived at, then it will be 12th April 1991. In our opinion, the latter would be the date and in this regard there is a mention of entry having been made in the worthy book and DSP having been informed as stated by the Police Inspector Mr.Barot (Exh.152 page 577). Then there is panchnama Exh.164 page 647, which clearly records the entire details in writing. When this material was pointed out, the learned Advocates for the appellants did not press the point. So it is left at that.

7. However, when they came to the aspect of handling of muddamal, in our opinion, they have, indeed, a very strong case. On 13-4-1991 raid was carried out in the latter part of the day and the seizure was certainly in the evening part of the day. Police Inspector Mr.Barot has stated as much in his deposition Exh.152 and has also indicated that muddamal article was handed over to the police station and in support thereof, he has a note addressed by the Police Officer, Bharuch City duly signed by him, which is Exh.106 dated 13-4-1991.

8. Thereafter, muddamal article came to be sent to the Forensic Science Laboratory for analysis which was done under a forwarding note Exh.166, page 687 which is dated 27-4-1991. This is said to have been received by the Forensic Science Laboratory on 1-5-1991 as per Exh.167 page 691. The question, therefore, remains as to what happened to the muddamal between 13-4-1991 and 27-4-1991. It assumes importance because it being a case under NDPS Act, the possession of Article becomes an offence provided it is shown to be a Narcotic Drug or a contraband article under NDPS Act. For establishing this, the prosecution shall have to establish on record by leading evidence that the material which was seized from the accused was the same which was sent for analysis and which, in turn, on analysis was found to be an article, the possession of which would amount to an offence under NDPS Act. We are confining to the aspect of possession because that is the case against the accused-appellant in the present matter.

9. In this connection, LAPP Mr.Y.F.Mehta had been at pains to point out that the Police Inspector who carried out the raid has done his duty and instruction was given to proceed with the matter in due course in accordance with law. This would mean that the articles were to be sent to FSL for analysis and that has been done. However, there is no evidence whatsoever on the score whether the article sent for analysis was that very article which was seized.

10. The appellants are relying on 2 decisions of the Supreme Court : one is AIR 1980 p.1314--State of Rajasthan vs. Daulat Ram where various persons were found to have handled the muddamal article and the persons in custody of the samples were not examined. In absence of this missing link, their lordships held that the conviction was not warranted. In the case before us, there is no indication as to what happened to the muddamal article between 13-4-1991 and 27-4-1991. It is, therefore to be presumed that it was kept in the police station. However, in view of the requirement of Sec.55 of the NDPS Act, atleast the prosecution before the trial Court was expected to give the details as to how the learned Magistrate exercising jurisdiction was informed, how the samples were taken out of the custody of the police station, by whom and the manner of it being sent to the FSL, so that the identity can be established. That aspect is missing.

11. The second decision is in the case of Valsala vs.

State of Kerala reported in 1993 (4) JT SC 549. Neither before the trial Court nor before the High Court on behalf of the accused-appellant, the question of identity of the article sent for analysis was raised and Their Lordships felt that this important aspect of establishing the identity of the muddamal and as to the complete chain has to be gone into and after doing so, in the case before Their Lordships, it was found that the evidence was not at all led to establish the identity. Relying on this very decision, Mr.Mehta submitted that the position, in the instant case, is much better. It is clearly established that the Police Inspector, who had carried out the raid had, without any delay, handed over the Article to the Police Station Officer, who in turn, on 27-4-1991 under the said forwarding note, sent it to FSL which received it on 1-5-1991. According to Mr.Mehta, LAPP, therefore, there is no manner of doubt as to the identity of the muddamal article. Further, the Report of the FSL having been exhibited by consent, the identity is not at all questioned by the defence. To that extent we may certainly agree with Mr.Mehta that the FSL Report had been admitted by consent and therefore, as to the articles analysed by the FSL, there is no dispute whatsoever. However, what concerns us is the identity of the article which was seized and sent for analysis. Unless it is established that it was the article which was seized, that very article was sent for analysis, in our opinion, merely because the report has been taken on record with the consent of the parties, the point with regard to the identity of the muddamal which was seized and sent for analysis will not disappear. For this, link is required to be established of more than one person, who handed it over, as clearly laid down in the said 1980 Supreme Court decision and the details as to the handling of the muddamal right from the time that it was seized, handed over to the PSO and thereafter sent to the FSL where it was received, have to be established. Then only the result of the analysis can have bearing on bringing home the charge under NDPS Act against the accused-appellants. In absence of examining the witnesses like the PSO who handled it or the persons who carried it and the state of the sample that was there in the interrugnum, in our opinion, it will prove fatal to the prosecution and therefore, on this score, the appellants will succeed.

12. In the result, the appeal is allowed. The order of conviction is set aside. The appellants are ordered to be set at liberty forthwith, if not required in any other case. Fine, if paid, is ordered to be refunded.

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